St. Louis Cardinals, LLC *and* Joe Bell. Case 14–CA–213219

October 6, 2020

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS EMANUEL AND MCFERRAN

On January 3, 2020, the National Labor Relations Board remanded allegations concerning whether the Respondent violated Section 8(a)(3) and (1) by discharging statutory employee James Maxwell and refusing to recall statutory employee Eugene Kramer.[1] Specifically, with respect to the allegations concerning Maxwell and Kramer, the Board instructed the judge to further analyze and make findings as to whether the Respondent met its defense burden under *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Mgmt. Corp.*, 462 U.S. 393, 399–403 (1983). On May 15, 2020, Administrative Law Judge Arthur J. Amchan issued the attached decision on remand. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[2] findings,[3] and conclusions[4]

[1] *St. Louis Cardinals, LLC*, 369 NLRB No. 3 (2020).

[2] On April 8, 2020, the judge issued an Order Rejecting the General Counsel and Respondent's Settlement with Regard to Alleged Discriminatee Eugene Kramer. Additionally, on May 8, 2020, the judge issued an Order Denying Respondent's Motion to Reconsider his April 8 Order.

[3] The Respondent has excepted to some of the judge's credibility findings. In the underlying decision, the Board found no basis for reversing the judge's credibility findings, citing *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). 369 NLRB No. 3, slip op. at 1 fn. 1. The judge stated in his initial decision that he made his findings based on the entire record, including his observation of the demeanor of the witnesses. Id., slip op. at 4. Although the judge in his decision on remand expounded on his credibility findings without referencing his observation of the demeanor of the witnesses, we have carefully examined the record as a whole and again find no basis for reversing the findings. See *Stevens Creek Chrysler Jeep Dodge*, 357 NLRB 633, 635 (2011) (making credibility findings based on "'the weight of the evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole'") (quoting *Humes Electric, Inc.*, 263 NLRB 1238, 1238 (1982)), enfd. sub nom. *Mathew Enterprise, Inc. v. NLRB*, 498 Fed. Appx. 45 (D.C. Cir. 2012).

In particular, in affirming the judge's discrediting of statutory supervisor Patrick Barrett, we rely on the following examples cited by the judge in which the record shows that Barrett did not testify truthfully. First, Barrett claimed that he did not recall statutory employee Joe Bell because Bell was already working elsewhere. However, Barrett did not know whether other painters to whom he offered employment were already working, and he knew that seasonal painters like Bell would obtain releases from their employers to perform seasonal work for the Respondent. Second, Barrett claimed that he was involved in cleaning up paint that Kramer left on the floor at a project at Artistry Florists in 2013, but the contractor on that project credibly testified that Barrett did not work with Kramer on that job, and Barrett did not in fact perform any cleanup work on that project. Third, Barrett claimed that he witnessed Maxwell and Kramer smoking marijuana together in an automobile in 2012 or 2013, but Kramer did not start working for the Respondent until 2014. We find that these inconsistencies and inaccuracies in Barrett's testimony provided the judge with a sufficient basis for discrediting his testimony.

However, we do not rely on the judge's following reasons for discrediting Barrett's testimony: (1) the speculation that retired Foreman Billy Martin did not recall employees whose work was substandard; (2) Barrett's omission of marijuana use as a purported reason for discharging Maxwell and not recalling Kramer from his Board affidavit in support of a separate 8(b)(1)(B) unfair labor practice charge filed by the Respondent and at the February 2018 Joint Trade Board meeting over Maxwell's and Kramer's grievance against the Respondent, at which it was agreed that no contractual violation occurred; and (3) the statement by Respondent Director of Facility Operations Hosei Maruyama to Kramer and statutory employee Thomas Maxwell that "actions have consequences." In declining to rely on this last statement, we observe that it was Barrett, not Maruyama, who made the Respondent's hiring decisions.

Member McFerran agrees that the evidence cited above is sufficient to establish that the Respondent did not meet its *Wright Line* burden. She relies in addition, however, on other evidence cited by the judge. In particular, she relies on the statements made separately to two of the discriminatees by the Respondent's director of facility operations, Hosei Maruyama, that their "actions have consequences" for their reemployment, referring to the discriminatees' filing of internal union charges against Barrett. Although it was Barrett and not Maruyama who made the Respondent's hiring decisions, the authoritative comments by Maruyama—who was Barrett's superior and in a position to know his reason for not hiring the discriminatees—show that Barrett had communicated that reason to him. Member McFerran relies further on (1) the absence of substantiating evidence that the Respondent considered the two discriminatees' previous work inadequate; (2) the Respondent's November 2017 offers to rehire both discriminatees before Barrett learned of their union charges against him and hired other employees in their place; (3) the Respondent's subsequent confirmation in Kramer's and Maxwell's grievance proceedings that they were eligible for rehire; and (4) Barrett's failure to cite purported marijuana use by Maxwell and Kramer either in an affidavit he submitted to the Board concerning a related Board charge or at the February meeting over their discharge grievance.

[4] In describing the Board's underlying decision in this case, the judge noted that the Board found that, even though Barrett admitted that Maxwell's and Kramer's protected activity factored a "little bit" in his decision to discharge Maxwell and not recall Kramer, the "Respondent is still entitled to show, as an affirmative defense, that it would have decided not to employ James Maxwell and Eugene Kramer even in the absence of their protected activity." Although it did not affect his analysis of the Respondent's defense burden, in fn. 9 of his

and to adopt the recommended Order as modified and set forth in full below.[5]

ORDER

The National Labor Relations Board orders that the Respondent, St. Louis Cardinals, LLC, St. Louis, Missouri, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging, refusing to recall, or otherwise discriminating against employees for engaging in protected activity.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer James Maxwell and Eugene Kramer full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make James Maxwell and Eugene Kramer whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision on remand.

(c) Compensate James Maxwell and Eugene Kramer for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 14, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of James Maxwell and refusal to recall Eugene Kramer, and within 3 days thereafter, notify James Maxwell and Eugene Kramer in writing that this has been done and that the discharge and refusal to recall, respectively, will not be used against them in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place desig-

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decision on remand the judge remarked that "[t]he remand in this case calls into question" whether the Board still adheres to the proposition from *Wright Line* that the Board will not seek to quantitatively analyze the effect of the unlawful cause once it has been found. Contrary to the judge, there is no inconsistency between the remand and the proposition the judge cites.

In *Wright Line*, the Board stated that "in those instances where, *after all the evidence has been submitted, the employer has been unable to carry its burden*, we will not seek to quantitatively analyze the effect of the unlawful cause once it has been found." 251 NLRB at 1089 fn. 14 (emphasis added). Thus, the Board will find a violation without quantitatively analyzing the effect of the unlawful motive where the General Counsel proves that protected activity was a motivating factor in a respondent's decision to take an adverse employment action, *and* the respondent fails to carry its defense burden of showing that it would have taken the same adverse action even in the absence of the protected activity.

Here, the judge stated in his initial decision that Barrett's admission that protected activity factored "a little bit" in his decision not to hire the alleged discriminatees "essentially concedes the alleged violation." 369 NLRB No. 3, slip op. at 7. That was incorrect. Barrett's admission conceded that protected activity was a motivating factor in his decision, but it did *not* concede that the Respondent was unable to show that Barrett would have made the same decision even in the absence of the protected activity. As the Board stated in the underlying decision, with respect to Maxwell and Kramer it remained "unclear whether the judge discredited Barrett's testimony or, instead, simply declined to consider it, erroneously believing that the violations were already established by Barrett's admission." Id., slip op. at 2. In contrast, with respect to Barrett's refusal to recall statutory employee Bell, the judge clearly considered Barrett's asserted explanation and rejected it as "incredible." Id., slip op. at 5 fn. 2. However, because the judge did not conduct a similar analysis with respect to Barrett's purported serious concerns about the performance and behavior of Maxwell and Kramer, the Board remanded the issue to the judge to either clarify his analysis or conduct it in the first instance. In light of the judge's discrediting of Barrett's testimony with respect to Maxwell and Kramer, and the Respondent's choosing to rest its defense entirely on that testimony, we agree with the judge that the Respondent failed to meet its defense burden. Accordingly, the Respondent's unlawful motive is sufficient for finding the violation, and we so find without quantitatively analyzing the effect of that unlawful motive.

[5] In its exceptions to the judge's rejection of a proposed settlement and the judge's proposed remedy with respect to Kramer, the Respondent argues that, after the case was remanded to the judge, Kramer engaged in misconduct that would have rendered him ineligible for employment, which makes him ineligible for reinstatement and tolls his backpay as of the date of the alleged misconduct. Because the alleged misconduct occurred after the close of the unfair labor practice hearing and the record in this case, we will leave resolution of this issue to compliance. And because the misconduct is alleged to have occurred after the Respondent unlawfully refused to hire Kramer, we find applicable the postdischarge misconduct standard, as did the judge in his May 8, 2020 order denying reconsideration of his rejection of the proposed settlement regarding Kramer. Accordingly, if it wishes to establish that Kramer is not entitled to reinstatement and that his backpay must be tolled, the Respondent will have the burden of establishing that he engaged in misconduct so flagrant as to render him unfit for further service. See *Hawaii Tribune Herald*, 356 NLRB 661, 662 & fn. 8 (2011), enfd. sub nom. *Stephens Media, LLC v. NLRB*, 677 F.3d 1241 (D.C. Cir. 2012).

Because the Board in the underlying decision already ordered the Respondent to remedy the 8(a)(1) violation for impliedly informing employees that they were not being retained or recalled because they engaged in protected activity, we have modified the judge's recommended Order to remove the reference to that violation. We have also modified the judge's recommended Order to conform to the Board's standard remedial language, and in accordance with our recent decision in *Danbury Ambulance Service*, *Inc.*, 369 NLRB No. 68 (2020). We shall substitute a new notice to conform to the Order as modified.

The Respondent again urges us to modify our standard remedial relief. As the Board stated in the underlying decision, we see no reason for doing so at this time. 369 NLRB No. 3, slip op. at 1 fn. 2.

nated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Post at its St. Louis, Missouri facility copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 14, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. The Respondent shall take reasonable steps to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 18, 2018.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 14 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. October 6, 2020

John F. Ring, Chairman

William J. Emanuel, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge, refuse to recall, or otherwise discriminate against you for engaging in protected activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer James Maxwell and Eugene Kramer full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make James Maxwell and Eugene Kramer whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, less any net interim earnings, plus interest, and WE WILL make them whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate James Maxwell and Eugene Kramer for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 14, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the back-

[6] If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work, and the notices may not be posted until a substantial complement of employees have returned to work. Any delay in the physical posting of paper notices also applies to the electronic distribution of the notice if the Respondent customarily communicates with its employees by electronic means. If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

pay awards to the appropriate calendar years for each employee.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of James Maxwell and refusal to recall Eugene Kramer, and WE WILL, within 3 days thereafter, notify James Maxwell and Eugene Kramer in writing that this has been done and that the discharge and refusal to recall, respectively, will not be used against them in any way.

ST. LOUIS CARDINALS, LLC

The Board's decision can be found at www.nlrb.gov/case/14-CA-213219 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

Bradley A. Fink, and *Lauren M. Fletcher, Esqs.,* for the General Counsel.

Robert W. Stewart and *Harrison C. Kuntz, Esqs. (Ogletree, Deakins, Nash, Smoak & Stewart, P.C., St. Louis, Missouri)* for the Respondent.

DECISION ON REMAND

ARTHUR J. AMCHAN, Administrative Law Judge. On January 3, 2020, the Board issued its decision in this case, affirming my findings and conclusions that Respondent violated Section 8(a)(3) and (1) in discharging or refusing to recall Joe Bell to work as a painter at Busch Stadium, home of the St. Louis Cardinals in 2018. The Board reversed my findings with regard to Thomas Maxwell, concluding that the Cardinals did not violate the Act in refusing to recall or rehire him. It remanded to me the allegations regarding James Maxwell and Eugene Kramer, to provide Respondent an opportunity to show as an affirmative defense that it would have decided not to employ these employees even in the absence of their protected activity. 369 NLRB No.3.

Pursuant to the Board's order I invited the parties to file supplemental briefs on the record created in August 2018. The General Counsel and Respondent have filed supplemental briefs.[1] Discriminatees James Maxwell and Eugene Kramer submitted a letter which they served on the other parties. I have considered that letter only as it pertains to evidence already in the record.

Upon considering the record and the parties' supplemental briefs, I find that Respondent has not established its affirmative defense and that the Cardinals violated Section 8(a)(3) and (1) in failing to recall James Maxwell and Eugene Kramer to work as painters at Busch Stadium in January 2018.

STATEMENT OF THE CASE/ISSUES ON REMAND

This case was tried in St. Louis, Missouri on August 21–22, 2018. Joe Bell filed the initial Charge in this matter on January 18, 2018. The General Counsel issued the complaint on April 26, 2018.

The General Counsel alleged that Respondent, the St. Louis Cardinals, violated Section 8(a)(3) and (1) of the Act by discharging paint shop employee James Maxwell on or about January 9, 2018, and refusing to recall and/or rehire paint shop employees, Thomas Maxwell, Joe Bell and Eugene Kramer since about the same date. As noted above, the Board found the violation with regard to Bell and dismissed the allegations regarding Thomas Maxwell. The Board also affirmed my finding that Respondent, on or about January 18, 2018, by its Director of Facility Operations, Hosei Maruyama, violated Section 8(a)(1) by telling Thomas Maxwell that actions have consequences which implied that he and others were not being recalled (or being discharged) due to protected activity, the filing of internal union charges against paint shop foreman Patrick Barrett.

FINDINGS OF FACT

I. JURISDICTION

Respondent, a limited liability company operates the major league baseball team in St. Louis, Missouri. It annually derives gross revenue in excess of $500,000 and purchases and receives goods valued in excess of $50,000 directly from points outside of Missouri. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Painters District Council No. 58, of which the alleged discriminatees are members, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The Cardinals maintain a paint shop at Busch Stadium, where the team plays its home games. For 34 years Billy Martin was the paint foreman at the Cardinals' ballpark. By virtue of its collective bargaining agreement with the Union, the paint foreman must be a member in good standing with District Council 58. Martin was one of two full-time painters employed by the Cardinals.[2] Since 2010, James Maxwell was the other full-time painter. Prior to 2010, Maxwell had been a seasonal

[1] Respondent included in its brief a motion to reconsider my refusal to approve a settlement between it and the General Counsel pertaining to Eugene Kramer. I addressed that motion in a separate document.

[2] Respondent's current foreman, Pat Barrett, disputed this. He testified that James Maxwell was never full-time at the Stadium. I credit Maxwell, but think this fact would only be relevant in a compliance proceeding. It is clear that one painter besides the foreman worked substantially more hours than others. In 2017, this painter was James Maxwell. In 2018, Mark Ochs worked substantially more than other painters, except for Barrett.

painter. For periods of 6–8 weeks, both before the baseball season and afterwards, the Cardinals hired somewhere in the vicinity of 6 more seasonal painters.

The Cardinals' general practice was to recall the same seasonal painters year after year (Tr. 375). Thus, Thomas Maxwell had performed seasonal work for Respondent every year since 2006. Eugene Kramer had performed seasonal work every year since 2014 or 2015. Joe Bell's first year painting for the Cardinals was 2017. Patrick Barrett had worked for the Cardinals since 2006. Mickey Burns and Mark Ochs had also worked for the Cardinals as seasonal painters for at least several years prior to 2017. If a painter was offered seasonal work by the Cardinals while employed, he or she would leave their other job to accept Respondent's offer.

In July 2017, Billy Martin told Pat Barrett that he planned to retire in December 2017 (Tr. 299). Sometime in the summer or fall of 2017, but definitely prior to November 2, 2017, Martin informed his boss, Director of Facility Operations, Hosei Maruyama of his intention to retire in 2017 (Tr. 274–275). On November 2, 2017, with knowledge of Martin's intent to retire, Respondent sent or gave James Maxwell, Thomas Maxwell, and Eugene Kramer a letter indicating that the Cardinals intended to employ them in 2018 (GC Exhs. 10–12).

This letter also stated, "This letter is a reasonable assurance that your employment will continue for 2018." On November 6, all three indicated their intention to work for the Cardinals in 2018. There is no evidence that the Cardinals were unhappy with the quality of the work performed for it by any of the discriminatees.[3] Respondent also gave no indication that the decision of whether or not to recall the discriminatees would be left up to whoever was selected to replace Martin as foreman. I find that Respondent did not give Barrett the authority to select painters for the 2019 season until after he and Maruyama knew that the Maxwells, Kramer and Bell had filed internal union charges against Barrett.

Hosei Maruyama interviewed 3 painters to replace Martin: Patrick Barrett, James Maxwell and his brother, Thomas Maxwell. Maruyama testified that he interviewed James Maxwell as a courtesy to Billy Martin, thus implying that he only considered Thomas Maxwell and Pat Barrett for the foreman's position. Around Thanksgiving, the Cardinals selected Patrick Barrett for the position despite the fact that James Maxwell had worked for the Cardinals for a longer time and more regularly. James Maxwell, Thomas Maxwell, and Eugene Kramer were unhappy with this selection.

Maruyama called James Maxwell at the end of November to inform him that he had selected Pat Barrett to replace Martin. James Maxwell called Maruyama back a few hours later. He told Maruyama that Barrett was "not a good union guy" and did not deserve the paint foreman position. Maxwell also said he could not work for Barrett and that he was pressing internal union charges against Barrett (Tr. 255–57).

Maruyama testified that he reported this conversation to Barrett and Matt Gifford, the Cardinals' vice-president of operations, the same day. Maruyama told Barrett that the Maxwells were going to file charges against him with the Union (Tr. 300). In this conversation Maruyama did not tell Barrett that Maxwell said he could not work for Barrett. Barrett testified that he could not recall the date on which he learned that Maxwell said he could not work for him but then said it was "in December sometime, the end of December maybe," (Tr. 324). A few days later, Maruyama told Barrett that he would have the foreman's job as long as he kept his union card.

A few days after James Maxwell had the 2 conversations with Maruyama about the selection of Barrett, which I assume was early December, he called Maruyama again to tell him that he would bite his lip and make it (working under Barrett) work. Maruyama did not testify that he reported this conversation to Barrett. Barrett testified that "sometime in January" Maruyama told him that Maxwell would bite his lip and try to make it [painting for Barrett] work (Tr. 325). Barrett's failure to pinpoint dates makes this testimony irrelevant even if true. There is no evidence that Barrett had made offers of employment to anyone before learning that James Maxwell said that he would "make it work."[4] Moreover, I think it more likely that when Maruyama told Barrett that Maxwell initially said he could not work for Barrett, he also told him that Maxwell recanted this statement.

On December 4, 2017, James Maxwell, Thomas Maxwell, Joe Bell, and Eugene Kramer filed internal union charges against Barrett with District 58, alleging that contrary to the By-Laws of the Union, Barrett had regularly worked for non-union companies. Barrett worked on and off for non-union contractor Robert Shamel over a 10-year period, apparently with some regularity. James and Thomas Maxwell had been aware of this fact for years but only filed union charges after learning that Barrett had received the paint foreman position with the Cardinals. Thomas Maxwell and James Maxwell also performed work for Shamel on occasion. Eugene Kramer worked for Shamel once in about 2012.[5]

[3] At Tr. 331–332, Pat Barrett testified that his understanding of the purpose of these letters was to allow the Cardinals to run an extensive background check on every employee, thus implying that the letters do not mean what they say on their face. I do not credit this testimony insofar as it makes this implication. There is no foundation for Barrett's understanding. I find that the letters mean what they say, i.e., that as of November 2, 2017, the Cardinals intended to employ James Maxwell, Eugene Kramer, and Thomas Maxwell in 2018. There is no evidence in this record as to whether Joe Bell received such a letter.

[4] The Board in footnote 6 of its decision states that I expressed skepticism about Barrett's testimony, but did not clearly discredit it. Even if Maruyama advised Barrett that Maxwell said he could not work for him, this does not support Respondent's affirmative defense. For one thing, Barrett decided not to offer employment to Joe Bell and Eugene Kramer, who signed the internal charges and did not tell Maruyama that they could not work for Barrett. Thus, I conclude that even if Barrett was aware of the things James Maxwell said about working for him prior to deciding not to rehire him, that does not establish that Barrett would not have offered work to James Maxwell even if he had not filed internal union charges.

[5] There is no credible evidence that Joe Bell ever performed painting work for non-union companies while a member of the Union. In the fall of 2017, Barrett told Bell that if he needed side work (i.e., work for a non-union employer) Barrett had a lot of it (Tr. 133). Bell gave Barrett his telephone number (Tr. 134). Respondent did not ask Bell and Bell did not testify that he had ever performed non-union work while a member of the Union. I decline to credit Pat Barrett's self-

On January 2, 2018, Pat Barrett assumed the duties of paint shop foreman. On January 3, a union trial board held a hearing on the charges filed against Barrett. Barrett and James Maxwell testified in the hearing. The Union levied a $15,000 fine against Barrett. However, it suspended $12,000 of this amount if Barrett paid $3000 within 90 days. James Maxwell, Thomas Maxwell, Joe Bell, and Eugene Kramer appealed the Trial Board's decision contending that it was too lenient.[6]

On January 9, Gregg Scott, the Union's Business Manager, and Director of Organizing Richard Lucks met with Cardinal representatives and informed them that the Union would not seek removal of Barrett from the paint foreman position so long as he paid the $3000 fine on time.

On January 9, 2018, Eugene Kramer had telephone conversations with the Cardinals Director of Facility Operations, Hosei Maruyama. Kramer complained about Barrett's temper. Maruyama told Kramer he left hiring up to Barrett and that Kramer would have to go through the Union's hiring hall if he wanted to work for the Cardinals again. Eugene Kramer testified that Maruyama told him that actions have consequences, clearly implying that he would not be called back by the Cardinals (or at least without going through the hiring hall) because the 4 painters filed internal union charges against Barrett. Maruyama testified that he did not recall making such a statement (Tr. 261). I credit Kramer that Maruyama said this or something substantially similar. A set forth below, this is what Maruyama said to Thomas Maxwell 9 days later in a recorded conversation. Moreover, it is more likely than not that Maruyama explained to Kramer why he would have to go through the union hall when that had not been the case in prior years.

As stated above, in a conversation with Thomas Maxwell on January 18, Maruyama said that actions have consequences, clearly implying that the 4 painters would not be called back by the Cardinals (or at least without going through the hiring hall) because they filed internal union charges against Barrett (G.C. Exhs 9(a) and (b)).[7]

On January 18, 2018, James Maxwell, Thomas Maxwell, Joe Bell, and Eugene Kramer filed a grievance pursuant to the Union's collective bargaining agreement with the Cardinals. They were seeking to be recalled to work at the paint shop at Busch Stadium. At a labor-management meeting about the grievance on February 21, 2018, Pat Barrett and Matt Gifford, the Cardinals' vice-president of operations, represented Respondent. The labor-management trial board did not require Respondent to recall the Maxwells, Kramer and Bell. Respondent and the Union also agreed that the Cardinals did not violate their collective bargaining agreement by promoting Barrett to paint shop foreman.

At the trial board proceeding, Gifford stated that the Maxwells, Bell and Kramer were eligible for rehire (R. Exh. 10). Neither Gifford nor Barrett made any statements about any misconduct or inferior work by any of the discriminatees. In its written submission for the grievance (R. Exh. 9), Respondent stated that painters were hired for the 2018 season because they were the best qualified in the judgement of management "and solely because of that reason." That submission did not make any allegations of misconduct or inferior work on the part of James Maxwell, Eugene Kramer or the other 2 discriminatees.

The Cardinals did not go through the hiring hall to obtain seasonal painters when Martin was the foreman. Martin generally recalled the same painters for seasonal work year after year. Barrett continued this practice with regard to painters who did not sign the internal union charges against him.

During the second week of January 2018, Barrett offered Mark Ochs, who worked for the Cardinals in 2017 and did not sign the union charges, work in the winter/spring of 2018. The second painter to get an employment offer from Barrett in January 2018 was Mickey Burns, who also worked for the Cardinals in 2017 and did not sign the union charges. Neither was hired via the Union's hiring hall. Barrett hired other painters who had not worked for the Cardinals in 2017 after offering employment to Ochs and Burns. Only one of these, Duane Oehman, was hired through the Union's hiring hall. Pat Barrett's testimony does not establish that all those hired for the 2018 season were more qualified that any of the discriminatees. This is particularly true of Duane Oehman. The record does not establish that Barrett had any familiarity with the quality of his work.

Patrick Barrett initially did not offer employment to any of the four discriminatees. On February 5 and 8, after Joe Bell filed the initial ULP charge in this proceeding, Barrett offered employment to Thomas Maxwell. Maxwell did not respond to the offer. Barrett conceded at the instant hearing that the fact that the 4 had brought internal union charges against him was a factor in his decision not to offer them employment in 2018 (or initially offer Thomas Maxwell employment).

I find that Respondent has not established that it would have failed to recall James Maxwell and Eugene Kramer in 2018 had they not filed internal union charges against Patrick Barrett. Not only do I discredit Barrett's alternative explanations, but his testimony and Hosei Maruyama's statements to Thomas Maxwell establish that the internal union charges were the reason for Respondent's decisions in this regard.

Analysis

Respondent violated Section 8(a)(3) and (1) by not offering James Maxwell and Eugene Kramer employment in 2018

The filing of internal union charges is protected activity. It

serving testimony at Tr. 296–297 that Bell told him he had performed side work previously. I do not regard Barrett as a reliable witness inasmuch as his testimony as to the reasons he did not offer Bell work in 2018 is incredible. Thomas Maxwell suggested that Barrett trying to recruit Bell for non-union work motivated the 4 to file charges with the Union.

Kramer denied ever working for Shamel. I credit Shamel in as much the record indicates no reason for him to fabricate this testimony.

[6] The record does not reflect when this appeal was filed.

[7] I do not credit Maruyama's testimony at Tr. 264 that when he told Thomas Maxwell that, "actions have consequences," he was referring to James Maxwell telling him that he could not work for Pat Barrett. The recording of the conversation makes it clear that Maruyama and Thomas Maxwell were talking about the filing of the internal union charges and Thomas Maxwell's assertion that Barrett was continuing to recruit union painters for non-union work. Maruyama and Thomas Maxwell did not discuss James Maxwell or his comment about working for Barrett (G.C. Exh. 9).

is an unfair labor practice for an employer to discriminate against an employee for filing internal union charges, *M. J. Electric,* 311 NLRB 1177, 1179, 1183, (1993); *Tracy Towing Line,*166 NLRB 81, 82 (1967).[8]

In order to establish a violation of Section 8(a)(3) and (1), the Board generally requires the General Counsel to make an initial showing sufficient to support an inference that the alleged discriminatee's protected conduct was a 'motivating factor' in the employer's decision. Then the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of protected conduct, *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (lst Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Mgmt.t Corp.,* 462 U.S. 393, 399–403 (1983); *American Gardens Management Co.*, 338 NLRB 644 (2002).

Respondent, through its agent, Patrick Barrett, admitted that this protected activity factored "a little bit" in its decision not to employ the 4 discriminatees in 2018 (Tr. 321, 392). The Board in its January 3, 2020 decision in this case, held that Barrett's admission only supports a finding that the alleged discriminatees' internal union charges were a motivating factor for Barrett's decision and that Respondent is still entitled to show, as an affirmative defense, that it would have decided not to employ James Maxwell and Eugene Kramer even in the absence of their protected activity.[9]

I find that Respondent has failed to make out such an affirmative defense. First of all, Hosei Maruyama implicitly told Thomas Maxwell and Eugene Kramer that the filing of the internal union charge was the reason the four discriminatees would not be working for the Cardinals in 2018.[10] Secondly, I decline to credit Pat Barrett's testimony to the extent it suggests that Respondent would not have hired James Maxwell and Eugene Kramer even if they had not filed internal union charges against him.

Barrett's explanation for not hiring Joe Bell, for example, is obviously pretextual, and is one reason I will not credit any of his self-serving testimony and post-hoc explanations regarding his decision not to recall James Maxwell and Kramer. Barrett testified he did not offer Bell employment because Bell was already working. However, he did not know whether or not other painters to whom he offered employment were working when he offered them employment. Moreover, Barrett knew that in the past, the seasonal painters had obtained releases from their employers in order to do seasonal work for Respondent. Barrett did not have any issues with the quality of Bell's work and was more familiar with Bell's work than with some of the painters he hired instead of Bell (Tr. 360–361).

Barrett offered the following reasons, in addition to his protected activity, for not hiring James Maxwell: Poor work ethic, sloppy work, sitting while painting and marijuana use off the clock in 2012 or 2013.[11]

As Respondent points out in its brief, uncontradicted testimony is usually credited. However, there is no obligation for a judge to credit a witness' uncontradicted testimony when other

[8] The discriminatees' filing of union charges is not any the less protected because they were seeking to remove Pat Barrett from his foreman's position. An analysis of whether these employees' activities are protected depends on whether the identity and capability of the supervisor involved has a direct impact on the employees' own job interests and on the performance of the work they are hired to do, *Senior Citizens Coordinating Council,* 330 NLRB 1100, 1103 (2000). In addition to their concerns about Barrett shortchanging the Union, Kramer and James Maxwell informed Respondent via Maruyama that they would find it difficult to work under Barrett. James Maxwell, Eugene Kramer, and James Bell also testified or at least indicated that they were concerned, before they filed the internal union charges, that that Barrett would discharge them.

As a general matter, employees have a protected right to complain about a supervisor and even to seek the supervisor's discharge, when the supervisor's conduct can affect the conditions of their employment, *Calvin D. Johnson Nursing Home,* 261 NLRB 289 (1982) enfd. 753 F.2d 1078 (7th Cir. 1983); *Dreis & Krump Manufacturing, Inc.,* 221 NLRB 309, 315 (1975) enfd. 544 F.2d 320 (7th Cir. 1976); *Avalon Carver Community Center*, 255 NLRB 1064 (1981).

Bovee and Crail Construction Co., 224 NLRB 509 (1976), cited by Respondent is inconsistent with this line of cases. Moreover, it is distinguishable in that the discriminatees in that case were members of the Union's executive board. By contrast, the discriminatees in this case did not hold any position with the Union.

[9] The Board has stated that it will not seek to quantitatively analyze the effect of the unlawful cause once it has been found. "It is enough that the employees' protected activities are causally related to the employer action which is the basis of the complaint. Whether that 'cause' was the straw that broke the camel's back or a bullet between the eyes, if it were enough to determine events, it is enough to come within the proscription of the Act," *Wright Line,* 251 NLRB 1083, at 1089 fn. 14; accord: *Bronco Wine Co.*, 256 NLRB 53, at 54 fn. 8 (1981). The remand in this case calls into question whether the Board still adheres to the proposition stated above.

In this regard, I note that *Oakes Machine Corp.*, 288 NLRB 456, 458 (1988) cited in Respondent's brief is distinguishable from the instant case. Unlike Barrett, the employer in that case did not concede that one of the reasons for terminating supervisor Kress was a protected reason [indicating that he would testify on behalf of a subordinate in a Board proceeding]. The judge found that the reasons the employer gave for Kress' termination were pretextual and thus inferred that one of the reasons for Kress' discharge was protected, 288 NLRB at 462 fn. 1, 466, 471.

[10] The fact that Respondent did not violate the Act because it ultimately offered to recall Thomas Maxwell does not establish that it did not violate the Act with regard to his brother and Eugene Kramer. It is well established that an employer's failure to take adverse action against all union supporters, or employees who engaged in other protected activity, does not disprove discriminatory motive, otherwise established, for its adverse action against a particular employee, See *NLRB v. Nabors,* 196 F. 2d 272, 276 (5th Cir. 1952); *Master Security Services,* 270 NLRB 543, 552 (1984); *Volair Contractors, Inc*. 341 NLRB 673, 676 fn. 17 (2004). Moreover, the Board found that Respondent violated the Act in failing to recall Joe Bell for the same reason that failed to rehire or recall James Maxwell and Eugene Kramer. Finally, G.C. Exh. 9 (a)and (b) make it abundantly clear that on January 18, 2018, Hosei Maruyama was conveying to Thomas Maxwell that the filing of internal union charges was the reason that Respondent was not as of that date going to recall all 4 discriminatees in 2018. After Bell filed the unfair labor practice charge in this case, Respondent obviously changed its mind about recalling Thomas Maxwell.

[11] Barrett also testified that James Maxwell normally had marijuana in his car or carried it with him. However, he did not give a time frame for these observations. Billy Martin either was unaware of this or recalled James Maxwell to work year after year anyway.

circumstances indicate that it is unreliable, *Aero, Inc.,* 237 NLRB 455, fn. 1 (1978); *Operative Plasterers' & Cement Masons International Association, Local 394 (Burnham Bros., Inc.)* 207 NLRB 147 (1973). I decline to credit Pat Barrett's testimony in this regard in that Maxwell worked for years for Billy Martin and was recalled year after year. Martin did not recall painters whose work was substandard. Moreover, neither Barrett nor any other agent of the Cardinals made such claims at the February 21, 2018 meeting on the discriminatees' grievance. To the contrary, Matt Gifford, the Cardinals vice-president of operations stated all 4 discriminatees were eligible for rehire.

There is no evidence that Maxwell was ever disciplined or even counseled for his work at Busch Stadium; there is also no evidence that Barrett ever complained to Martin about Maxwell's alleged shortcomings. Additionally, Barrett did not mention marijuana use as a reason he did not recall Maxwell at the February 2018 grievance hearing or in his affidavit to a Board agent. I conclude these matters, even if valid, did not become issues for Barrett until Maxwell signed internal union charges against him.

With regard to Eugene Kramer, Barrett relied on an incident in 2012 when Kramer allegedly left paint on the floor of Artistry Florists when working for non-union contractor Robert Shamel.[12] Barrett testified that "we" had to repaint a lot of the job. Shamel, however, testified that Barrett did not work with Kramer on that job. Furthermore, it was Shamel and Shamel's brother, who owned the building, who cleaned up after Kramer; not Barrett (Tr. 250–251). Shamel did not testify about telling Barrett about this incident; thus, it is unclear when Barrett became aware of it. Thus, I do not credit Barrett's testimony that he did not recall Kramer on account of Kramer's work at Artistry Florist, or that this was a factor in his decision. As noted, before he did not assert that Kramer's work was substandard at the February 2018 grievance meeting or mention Artistry Florist. If those were reasons for which he failed to recall Kramer, Barrett would have mentioned these considerations.

Another reason I decline to credit Barrett's testimony is his assertion that he saw Kramer and James Maxwell smoking marijuana together in an automobile in 2012 or 2013 (Tr. 323). Kramer did not work for the Cardinals or at Busch Stadium until 2014 (Tr. 149, 379). Moreover, Barrett did not mention marijuana use as a reason for not recalling either Kramer or James Maxwell in his Board affidavit or at the February 21, 2018 grievance proceeding (Tr. 381–382, R. Exhs. 9 and 10).

As in the case of James Maxwell, there is no explanation as to why Billy Martin recalled Kramer if his work was substandard. From this I conclude it was not. Also, as in the case of Maxwell, there is no evidence that he was ever disciplined or counseled for poor work, marijuana use or anything else while working at Busch Stadium. As in Maxwell's case, Barrett's affidavit doesn't give marijuana use as a reason for not hiring Kramer and very unspecifically refers to "work performance and availability." There does appear to have been some friction between Kramer and Barrett prior to Barrett becoming foreman. At Tr. 186–189, Kramer testified that he knew beforehand that if Barrett got the foreman's job, he would not be rehired. However, there is no credible evidence as to why Kramer thought this to be the case—other than his assessment of Barrett's temperament. In summary, I conclude that had not James Maxwell and Eugene Kramer filed internal union charges against Patrick Barrett, Respondent would have offered them employment in 2018.

Finally, that Respondent sent James Maxwell and Eugene Kramer a letter on November 2, 2017, giving them reasonable assurances that they would be recalled in 2018, belies Respondent's affirmative defense. At that point Barrett and Maruyama knew that Billy Martin was retiring in December, yet neither raised any concerns about recalling Maxwell and Kramer. The Cardinals did not, on November 2, indicate that the new foreman would decide who would be recalled to work. I find that in order to make out an affirmative defense, Respondent would have to proffer a credible explanation as to the circumstances by which the reasonable assurances of continued employment transmitted on November 2 were withdrawn. Respondent must show either that it gave Barrett authority to hire his own crew for nondiscriminatory reasons or that Maruyama or someone else in the Cardinals hierarchy decided not to recall the discriminatees for a non-discriminatory reason.

On November 2, somebody in the Cardinals organization believed they had authority to offer continued employment to James Maxwell and Eugene Kramer without getting clearance from Barrett. In order to make out its affirmative defense, Respondent is obligated to explain how and why that changed, or otherwise credibly explain the circumstances by which the assurances of continued employment were withdrawn. It has not done so.

Supplemental Conclusion of Law

Respondent violated Section 8(a)(3) and (1) in discharging or failing to recall James Maxwell to work in 2018 and in failing to recall Eugene Kramer.

Remedy

The Respondent, having discriminatorily discharged James Maxwell, must offer him reinstatement and make him whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB 6 (2010). Respondent shall compensate him for his search-for-work and interim employment expenses regardless of whether those expenses exceed his interim earnings, computed as described above.

The Respondent, having discriminatorily failed to recall Eugene Kramer, must offer him reinstatement, and make him whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as pre-

[12] This testimony is not uncontradicted. Kramer testified that he never worked with Barrett and denied ever working for Shamel or at Artistry Florists. I have credited the testimony of Shamel that Kramer did work for him at Artistry Florists. However, Shamel's testimony detracts from Barrett's credibility rather than enhances it.

scribed in *Kentucky River Medical Center,* 356 NLRB 6 (2010). Respondent shall compensate him for his search-for-work and interim employment expenses regardless of whether those expenses exceed his interim earnings, computed as described above.

Respondent shall file a report with the Regional Director for Region 14 allocating backpay to the appropriate calendar quarters. Respondent shall also compensate James Maxwell and Eugene Kramer for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year, *AdvoServ of New Jersey,* 363 NLRB 1324 (2016).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[13]

ORDER

The Respondent, the St. Louis Cardinals, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging, failing to recall, or otherwise discriminating against any employee for engaging in protected activity, including the filing of internal union charges.

(b) Impliedly informing employees that they are not being retained or recalled because they engaged in protected activity.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer James Maxwell and Eugene Kramer full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make James Maxwell, and Eugene Kramer whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision. Compensate James Maxwell and Eugene Kramer for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 14, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

(c) Compensate James Maxwell and Eugene Kramer for their search-for-work and interim employment expenses regardless of whether those expenses exceed their interim earnings.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its St. Louis facility copies of the attached notice marked "Appendix".[14] Copies of the notice, on forms provided by the Regional Director for Region 14, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 18, 2018.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. May 15, 2020

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge, fail to recall, or otherwise discriminate against any of you for engaging in union or other protected concerted activity, including the filing of internal union charges.

WE WILL NOT inform you implicitly that you are not being offered work due to your protected activity.

[13] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[14] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the

exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer James Maxwell and Eugene Kramer full reinstatement to their former jobs or, if those jobs no longer exist, to a substantially equivalent position, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make James Maxwell and Eugene Kramer whole for any loss of earnings and other benefits resulting from their discharge or failure to be recalled or timely recalled, less any net interim earnings, plus interest compounded daily.

WE WILL compensate James Maxwell and Eugene Kramer for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file a report with the Regional Director for Region 14 allocating the backpay award to the appropriate calendar quarters.

WE WILL compensate James Maxwell and Eugene Kramer for their search-for-work and interim employment expenses regardless of whether those expenses exceed their interim earnings.

ST. LOUIS CARDINALS, LLC

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/14-CA-213219 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.